SEP 27 1921
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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 96

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

Brief for the Appellant

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Printed by THE SERVICE PRESS, 423-425 G St., N.W., Washington, D. C.

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1. STATEMENT OF THE CASE

The petition was filed with the Court of Claims on June 28, 1915, demanding pay for the transportation

of 1,000 bags of gold coin, each weighing 18¾ pounds, said to contain $5,000 each, in gold, at the express rate, amounting to $5,000, together with $20.65 for seven passenger fares for armed guards, between the city of New York and the city of Springfield, Massachusetts, which petition is found beginning on page 1 of the record.

The case was tried on June 7, 1920, upon an agreed statement of facts.

On June 14, 1920, the court entered a Findings of Fact, beginning on page 8 of the record, and the Conclusion of Law, dismissing the petition, which judgment of the court is found on page 14 of the record.

An appeal was allowed on June 28, 1920, and the record was filed in the Supreme Court of the United States on June 29, 1920.

2. STATEMENT OF THE FACTS

The New York, New Haven & Hartford Railroad Company, the plaintiff herein, is a corporation duly incorporated under the laws of the States of Connecticut, Rhode Island, and Massachusetts, and is engaged, among other business, in operating mail trains on its own and leased lines through the several States of its incorporation.

On October 23, 1914, the Post Office Department received from the Treasury Department at Philadelphia, Pa., at the United States mint, 1,000 bags, each weighing 18¾ pounds, and said to contain $5,000 each in gold, for transmission by United States mails from Philadelphia, Pa., to Boston, Mass.

Said bags were properly sealed at the United States

mint at Philadelphia before delivery to the postal authorities. They were placed in 167 mail pouches, which were locked with rotary mail locks, and labeled "Boston, Mass." The Treasury Department prepaid the postage required for fourth-class mail matter at parcel-post rates, amounting to $420.

These bags were received and treated by the Post Office Department as mail matter of the fourth class, which was thereupon transported from Philadelphia to New York, N. Y., on New York and Pittsburg R. P. O. train No. 34, of the Pennsylvania Railroad Company, in storage mail car of said train, accompanied by five railway mail officials and postal clerks, all of whom held the regular travel commissions for transportation over the Pennsylvania Railroad between Philadelphia and New York.

A Mail-storage car is a car in which through mails inclosed in pouches and sacks are deposited and transported between stated points, and in which no distribution of the mails is performed, and may be either a car specially equipped with stanchions for the separation of the made-up mails according to destinations or an ordinary baggage car.

On arrival at New York the 167 pouches were placed in a vault at the subtreasury, subject to the call of the chief clerk of Railway Mail Service. Thereafter, on October 24, the chief clerk and other railway-mail officers took the 167 pouches in auto mail trucks from the subtreasury to the Grand Central Station, New York, N. Y., where they were placed in postal car of Boston, Springfield and New York R. P. O. car attached to one of plaintiff's regular passenger trains, train No. 50, in

which they were transported to Springfield, Mass., over the New York, New Haven & Hartford Railroad, the plaintiff above named, and upon postal routes Nos. 106004 and 106005, mentioned in the petition, and thence to Boston, Mass., over the Boston & Albany Railroad (New York Central & Hudson River Railroad Co., lessee), accompanied by seven officials of the Railway Mail Service; all persons accompanying the same having and holding the requisite travel commissions from the Postmaster General for transportation over the said railroads between New York and Boston, as prescribed by the Postal Laws and Regulations.

The express rate, as shown by the Official Express Classification No. 22, effective February 1, 1914, on file in the Interstate Commerce Commission, was $1 for each $1,000 of gold coin transported between New York and Springfield at all times stated in plaintiff's petition.

The regular first-class passenger rate between the points stated above was $2.95 per passenger during all the time covered by the petition.

Upon the foregoing facts the plaintiff claims that the 1,000 bags of gold, contained in 167 mail pouches, were not mail of any class within the law or the Rules and Regulations of the Post Office Department, and were not offered by the Post Office Department to the Plaintiff to be transported as mail, between New York and Springfield, and that the seven armed guards were not transported in connection with this shipment of gold as officers of the Government entitled to free transportation, and that by reason of the facts above set out, the more extensively set out in the different sections

of the Findings of Fact by the court below, the plaintiff is entitled to recover the cost of transportation as express matter, in accordance with the express rate set out in the Findings of Fact, together with the passenger fares for the armed guards, all in the sum of $5,020.65.

3. ASSIGNMENT OF ERRORS

1. The court below erred in not finding that the shipment of gold coin was not within the law, and the Rules and Regulations of the Post Office Department.

2. The court erred in not finding that sealed packages of gold coin, each weighing 18¾ pounds, was not within the law and the Rules and Regulations of the Post Office Department for the shipment of parcel-post packages.

3. The court erred in not rendering judgment in favor of the plaintiff, upon the facts set out in the Findings of Fact made by the court.

4. The court erred in rendering judgment for the defendants, and in dismissing the petition of the plaintiff.

ARGUMENT

I.

The Contract of July 1, 1913 Did Not Include the Shipment of Gold Coin as Parcel Post Matter

The contract of July 1, 1913, was expressed by the distance circular set out in Exhibit A of the record,

the principal parts of which are included in Section II of the Findings of Fact, which as shown on page 9 of the record, contains the following provision:

> "The Company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department."

This is not a mail-pay case at all. It is an action for the transportation of express matter not included by law or by any rule or regulation of the Post Office Department within the classifications of mail matter. The contract as shown above provided for the carrying of mail and the performance of mail service upon the conditions in existence on July 1, 1913, as prescribed by law and the existing regulations of the Post Office Department. This shipment of gold coins, as described in the Findings of Fact, was not within the contract by any possible construction, and the railroad company in performing the service was not performing any mail service prescribed by law, or by any rule or regulation of the Department. The distance circular further provides that the company "reserves the right to claim and recover a reasonable compensation for any additional service which it may agree to perform." The appellant in this case, is not asking for additional pay for hauling the mails. Its rights in such a case were foreclosed by the decision of this Court in the case of the *New Haven Railroad Company* vs. *the United States* (251-U. S.-23); and no such claim is repeated in this action.

On July 1, 1913, when this contract for mail service was executed, the weight limit was 11 pounds in one

package, and certainly under this contract the plaintiff could not be required or expected to carry mail packages of 18.75 pounds. There was no agreement to accept packages in the future of nearly double that weight then prescribed by law. This contract could not be changed at a subsequent time by the Postmaster General alone, even if he had the authority to raise the weight limit by his own order as to other shipments. The appellant, on October 24, 1914, had never agreed to accept and carry any such packages as were shipped in this consignment of gold coins. The Findings of Fact, under Sections III, IV, VII, and VIII, are utterly immaterial to the issues of this case, and may be entirely disregarded.

The further Findings of Fact under Section VI, set out on page 11 of the record, concerning orders of the Postmaster General, pretending to increase the weight limit of parcel-post packages from 11 to 20 pounds, and then from 20 to 50 pounds, are also immaterial, as these orders, even if legal and valid as to others, were made after the contract with the appellant was entered into on July 1, 1913. These subsequent orders, even if legal and valid, could not apply to the contract of the plaintiff, then in existence, beginning on July 1, 1913, and ending July 1, 1917.

To the making of these orders, the appellant promptly protested, and as shown by the letter of Mr. Mellen under date of August 15, 1913, set out on page 7 of the record, which protest was acknowledged on August 22, as shown on the same page. It was clearly recognized by Congress, that parcel-post packages under Section 8 of the Act of August 24, 1912, 37 Stat.,

557, Compiled Statutes, 1918, Par. 7319, were not ordinary mail referred to by the Postmaster General in his letter of August 22, but were new and additional kinds of matter imposed upon the mail service, without any authority of law or within any rule or regulation of the Post Office Department. Carrying parcel-post packages above 11 pounds in weight was not within the plaintiff's contract of July 1, 1913, and the railroad company could not be compelled to carry these packages of 18.75 pounds a piece, and the compensation for the carrying of mail did not cover the compensation for the transportation of this shipment of gold coins.

Union Pacific R. R. v. *United States*, 104 U. S., 662, 26 L. 885.

Chicago and Northwestern R. R. v. *United States*, 104 U. S., 680, 26 L. 891.

Chicago, Milwaukee & St. Paul R. R. v. *United States*, 104 U. S., 687, 26 L. 893.

Atchison, Topeka and Santa Fe R. R. v. *United States*, 52, Ct. Cl., 338.

In the contract of July 1, 1913, there was no such reservation as would authorize an increase of the weight limit without increased compensation, as was made in the cases of

Eastern Railway Company v. *United States*, 129 U. S., 391, 32 L. 731.

Chicago, Milwaukee & St. Paul R. R. v. *United States*, 198 U. S., 385.

So far as this contract is concerned, these parcels of gold coin weighing 18.75 pounds were not within its terms, for the plaintiff had agreed to carry only such mail as was on July 1, 1913, "prescribed by law and

the existing regulations of the Department," and the "law and the existing regulations" then limited the weight to 11 pounds.

II.

The Orders of the Postmaster General Could Not Bring the Shipment of Parcel-Post Packages of 18.75 Pounds Within the Law, and the Existing Regulations of the Department on July 1, 1913.

Section 8 of the Act of August 24, 1912 (37 Stat., 539, 557), is set out in the 6th Section of the Findings of Fact, on page 11 of the record and reads as follows:

> "That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, not greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery."

This section of the statute had not been changed on October 24, 1914, when the shipment of gold coin was made, and in fact has never been changed by an act of Congress. If it were material, it could be shown as a matter of law that the Postmaster General had no power under the different paragraphs of Section 8 to change the weight limit from 11 to 20 and then to 50 pounds, as was pretended to be done. It is perfectly

clear from the later paragraph of the section that the classification of articles mailable "as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability under this act," could only be reformed and readjusted so as to render the act of Congress more strictly applicable to the conditions then in existence. It is not necessary, however, for us to argue that the orders of the Postmaster General of July 25 and December 18, 1913, increasing the weight limits from 11 to 20 and then to 50 pounds are illegal and void, because these orders were all issued after the contract was executed with the appellant on July 1, 1913, and could not be made applicable to the contract then in existence.

From these facts it is plain that the shipment of gold coin in packages of 18.75 pounds, which were not mail matter at all of any kind, and were not included within the contract with the appellant, or within the compensation paid for carrying the mails; for this reason sections VII and VIII of the Findings of Fact are also irrevelent and immaterial to the issues in this case.

III.

The Packages Were Not Stamped According to Law.

It is stated in Section IX of the Findings of Fact, on page 13 of the record, that "The Treasury Department prepaid the postage required for fourth-class mail matter at parcel-post rates, amounting to $420.4." It is a matter of common knowledge, of which this will take judicial notice, that the statute of August 24,

1912, 37 Stat., 557, Par. 7321, Compiled Statutes, 1918, being also section 445 of Postal Laws and Regulations, 1913, state that, "the postage in all cases, to be prepaid by distinctive postage stamps affixed."

It is well known that when this section of the statute was reprinted by the Postmaster General in 1913, he omitted the word "distinctive" and inserted three stars in its place. It is also well known that the Postmaster General has never complied with this law. In this case the postage which was paid by the Treasury Department was not paid in the "distinctive" postage stamps required by the statute. The Postmaster General can no more waive one section of the statute than another section of the statute, and then in violation of the positive contract, take advantage of his own waiver. These packages were not mail.

IV.

Gold Coins Cannot be Shipped in Sealed Packages of 18.75 Pounds each as Mail Matter of the First Class, and Sealed Packages Above 4 Pounds in Weight Are Not Mail of Any Class, According to Law or to the Rules and Regulations of the Department.

The second paragraph of Section IX of the Findings of Fact provides as follows

> "Such bags were properly sealed at the United States mint at Philadelphia before delivery to the postal authorities. They were placed in 167 mail pouches, which were locked with rotary mail locks and labeled, 'Boston, Mass.' "

Section 881 of the Postal Laws and Regulations of 1913 provides:

> "Coin in bulk, or heavy articles of medium or large size, when sent in registered letters, shall be sewed in canvas or material of equal strength, then wrapped in strong paper and securely sealed."

Here is a specific provision for the carrying of certain classes of mail. This provision applies to mail of the first class, and by section 462, the weight limit of mail matter of the first class is fixed at 4 pounds. The shipment of gold coin in packages of 18.75 pounds could not, therefore, be mail of the first class under any statute or regulation of the department.

Neither could the shipment of gold coin in packages, which were sealed, be mail of the fourth class under any statute or regulations of the department. Section 469, Postal Laws and Regulations, 1913, being paragraph 7335, Compiled Statutes, 1918, provides that the Postmaster General may prescribe by regulation "the manner of wrapping and securing for the mails all packages of matter not charged with first-class postage, so that the contents of such packages may be easily examined."

There was no statute or rule or regulation of the department authorizing parcel-post matter to be shipped in sealed packages which pouches "were locked with rotary mail locks."

It is clear from the above statutes, the rules and regulations of the Postoffice Department, and from the Findings of Fact, that these 1,000 packages of 18.75 pounds each, which were "placed in 167 mail pouches,

which were locked with rotary mail locks," were not shipped in accordance with any law or rule or regulation of the Postoffice Department, and therefore did not come within any of the terms of the contract for the carrying of the mails by the appellant executed on July 1, 1913.

It is claimed by the Postmaster General that the size of the packages and the rules and regulations for wrapping and shipping of packages, are solely for the benefit of the Post Office Department, and could not be taken advantage of by the carrier in this case. This might be true if the carrier was not affected by it in violation of his contract provisions. It is true that the appellant cannot prosecute the Postmaster General for violating the law, but that is not the point. In this case the appellant agreed to carry mail matter as prescribed by the law and the rules and regulations of the Post Office Department on July 1, 1913, and it cannot be claimed that the Postmaster General may so change his own rules and regulations as to utterly change the nature of this contract. In other words, the Postmaster General could not change his own rules and regulations after July 1, 1913, so as to make mail matter of express matter or freight, after that date, and then claim that it was of no concern of the appellant in this case. Neither the Secretary of the Treasury, nor the Postmaster General can violate the statutes of Congress, or the rules and regulations of the Post Office Department, and then claim that the appellant can be compelled to perform services not within its contract. Neither the Secretary of the Treasury nor the Postmaster General have any authority within the law or

within the rules of the department to declare the shipment of gold coins, as described in the Findings of Fact, mail of the fourth class so that the appellant would be required to perform such transportation as mail service.

If the railroad company had known that such a shipment of gold coins was to be made on October 24, 1914, and had positively refused to transport the same, neither the Secretary of the Treasury nor the Postmaster General could have compelled the performance of this service by a writ of mandamus, or any other process of court. If the appellant had on that date known of the prospective shipment, and then had refused to transport the same as mail matter, it could not be said that an action would lie against the appellant for violation of its contract, as set out in the distance circular of July 1, 1913.

The simple fact is that this shipment was in open and notorious violation of the law and the rules and regulations of the Post Office Department, and did not come within the provisions for the shipment of mail of the first or of the fourth class.

V.

The Seven Officials Were Passengers and Not Entitled to Free Transportation on this Trip.

It is shown in sections IX and X of the Findings of Fact, set out on page 13 of the record, that the appellant transported seven officials of the railway mail service to accompany the shipment of gold coin in issue. It is not claimed that these seven officials of the

railway mail service were transported in connection with any other mail service, but it is found that they accompanied the shipment in question. On proper official business and in connection with shipment of mail, these officials of the railway mail service were entitled to free transportation, but they were not entitled to free transportation to accompany a shipment of express matter or of freight, for these 1,000 bags of gold coin, each weighing 18.75 pounds, properly sealed before delivery, and placed in 167 mail pouches, which were locked with rotary mail locks, all weighing 9.2 tons, were not packages of mail within the law and rules and regulations of the Post Office Department. Then these packages being shipped on the appellant's regular passenger train No. 50 from New York to Springfield, Mass., were subject to the express rate of $1.00 for each $1,000 of gold coin, according to Official Express Classification No. 22, effective February 1, 1914, on file in the Interstate Commerce Commission, as shown in section XII of the Findings of Fact.

If this shipment was not mail, but was express, then the seven officials of the railway mail service were merely passengers upon the train from New York to Springfield, Mass., and the appellant is entitled to recover $2.95 for each transportation, as is also found in section XII of the Findings of Fact.

VI.

The Decision of the Court Below in the Case at Bar is in Conflict with the Prior Decision of the Same Court, Establishing the Law of Such a Contract as Was Executed on July 1, 1913.

In the case of *Wolverton* v. *The United States*, 34 Ct. Cl., 247, the Court said:

> "V. Under a mail contract, the carrying of empty bags beyond those made necessary by the preponderance of mail in one direction is extra service."

At page 270 Judge Davis said in the opinion

> "This is not a railway mail, and it is not a mail properly falling within the service contracted for by the plaintiff. The fact that in the performance of one service he visited a point in New Jersey is not a reason for imposing upon him an entirely different kind of service, theretofore performed under a different contract by another contractor. This work we regard as extra to the contract for 'Covered regulation wagon mail messenger, transfer, and mail station service in the city of New York, N. Y.,' and for performing it plaintiff should have reasonable compensation."

The case at bar is much stronger than the *Wolverton* case quoted above. The *Wolverton* case was brought for additional compensation in performing a similar service; in the case at bar the action is brought for the performance of an entirely different service than that mentioned and provided for in the contract.

The *Wolverton* case had not been overruled or set

aside, and in itself should have controlled the decision of the court below, but it cannot be claimed that the Postmaster General could bring within the contract of July 1, 1913, what neither then nor now is mail of the first or fourth class.

The express rates on gold coin shipped as described in the Findings of Fact were $1.00 for each $1,000 of gold coin, and the first-class passenger rates were $2.95 for each passenger. This gold coin was not mail and it was not freight, but was express, and the express charges were the sum of $5,000, which with the seven passenger fares make a total of $5,020.65, for which sum judgment is prayed.

For the reasons above given, the judgment of the court below should be reversed and judgment ordered according to the Findings of Fact.

Respectfully submitted,

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